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No. 95-326

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

J & T COAL, INCORPORATED,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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No. 95-326

J&T COAL, INCORPORATED,

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Respondent.

REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE CIRCUITS ARE CLEARLY SPLIT WITH RESPECT TO DOUBLE JEOPARDY PUNISHMENT ANALYSIS UNDER HALPER AND AUSTIN AND THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT.

Respondent essentially concedes that the Double Jeopardy issues raised in this petition merit review, but urges this Court, instead, to grant petitions it has filed

raising the same issues. United States v. Ursery, No. 95-345, and United States v. $405,089.23, No. 95-346. The fact that three petitions involving these same Constitutional questions were filed from the Fourth, Sixth and Ninth Circuits within the same week (August 24-28, 1995), speaks volumes as to the need for additional guidance from this Court on these matters.

Respondent's discussion of the Double Jeopardy issue graphically illustrates the existing uncertainty in this area, particularly with respect to the question of what constitutes "punishment" under United States v. Halper, 490 U.S. 435 (1989) and Austin v. United States, 125 L. Ed. 488 (1993). Those cases state:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448; see also Austin, 125 L. Ed. 2d at 498. Yet, respondent asserts that under Halper so-called "civil" fines many millions of dollars in excess of government costs can be dubbed "remedial." Br. in Opp. at page 8. Respondent's reliance on United States v. Barnett[1] only provides an additional log to the already burning dispute among the circuits regarding the

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[1]United States v. Barnett, 10 F.3d 1553 (11th Cir.) (cited for proposition that civil damages of $50 million would not impose punishment on defendant when the government suffered at least $15 million in losses from the defendant's conduct), cert. denied, 115 S. Ct. 74 (1994).

proper interpretation of "punishment" under Halper and Austin. See Petition at 13-14.

Certainly, respondent's emphasis on the district court's claim that the fines could "as easily be" classified remedial as punitive (Opp. Pet. at 3) does little to advance its position. This statement was made in the course of the district court's improper analysis of "Mendoza-Martinez factors"[2] (Pet. App. at 20-21) in an attempt to determine if the initial, $300,000 fine was punitive or remedial. The trial court made this statement relying on United States v. WRW Corp., 986 F.2d 138, 141 (6th Cir. 1993), which applied the same errant test. Thus, respondent merely highlights the confusion in the lower courts concerning the concept of "punishment" under Double Jeopardy analysis. As this Court stated in Austin, the Mendoza-Martinez factors do not address the question of whether punishment has been imposed (125 L. Ed. 2d at 498, n.6; Petition at 10-11) and the lower court was plainly wrong in basing its decision on these factors.

To the contrary, this Court stated in Austin and Halper that any civil sanction which does not solely serve a remedial purpose is "punishment." Austin, 125 L. Ed. 2d at 498. The circuits are split on how to interpret this admonition, however, and this case presents a clear opportunity for this Court to resolve the conflict.

Here, the largest "civil" MSHA fine in the history of Virginia (JA 299) was assessed against J&T -- a fine

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[2]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

well in excess of the government's sworn expenses. (Pet. App. 50-51.) Despite the punitive sting of this fine, the prosecution undertook a second proceeding against the defendant arising out of the very same incident and alleged mining violations which were the underpinning of the initial fines. This sort of double punishment is precisely what the Fifth Amendment protects against. This case cries out for further review.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO RESOLVE THE SPLIT AMONG THE CIRCUITS ON THE RECURRING QUESTIONS OF WHETHER, AND TO WHAT EXTENT, FACTUAL DISPUTES MUST BE RESOLVED BY A SENTENCING COURT IN CONNECTION WITH THE IMPOSITION OF CRIMINAL FINES.

In addition to raising vitally important Double Jeopardy issues, this petition also presents a raging split in the circuits concerning whether specific factual findings must be made on controverted factual issues when fines are imposed upon criminal defendants. Petition at 23-25 and n.8.

Ironically, respondent argues that whether J&T had the ability to pay a massive fine is a question too "fact-bound" to merit this Court's consideration. Opp. Pet. at 11. The problem is, factual findings on controverted issues were <u>not</u> made below despite J&T's clear objections to specific factual allegations of the pre-sentencing report. (JA 405-07.) The court's silence flatly contravenes Federal Rule of Criminal Procedure 32(c)(1) and related statutes.

Certainly, the prosecution's suggestion that the district court heard nearly two days of testimony concerning the defendant's ability to pay a fine is misleading. The government offered extensive evidence and arguments that JAD's finances should be considered as relevant in J&T's fines. JAD was not a defendant and JAD had a different ownership make-up than J&T. (JA 277.) Even the government argued to the court that it should pierce the corporate veil to consider JAD's resources. (JA 305, 308-14, 322.) This, however, the trial court specifically refused to do. (JA 329.)

It was inappropriate for the court to consider JAD's resources in calculating J&T's fine[3] -- and if it did so, it was incumbent upon the court to leave some sort of record to permit meaningful appellate review of its rulings. The prosecution's attempt to pass off the trial court's nebulous comments as sufficient to satisfy the requirements of Fed. R. Crim. Proc. 32 cannot withstand scrutiny. Plainly, the court failed to make a specific finding that J&T had the ability to pay a million dollar fine. (Even the Presentence Report stated that J&T did not have the ability to pay on its own. (JA 397 -- under seal.)) At the same time, the court failed to find that J&T and JAD were alter egos. (App. 33.) Even if it had concluded these entities were intertwined, there was no evidence JAD had funds sufficient to cover the massive fine. Again, not even the presentence report suggested that JAD had the ability to pay a

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[3]See Petition at 25-27, Zenith Radio Corp. v. Hazletine, 395 U.S. 100 (1969).

seven-figure fine.[4] The Court of Appeals simply commented that making the requisite findings would have been "cumbersome" (Pet. App. 13) and let the fine stand.

The unfairness of imposing a crippling fine without resolution of relevant, controverted factual issues is as inequitable as it is violative of Rule 32 and related statutes. The split among the circuits on this recurring question merits attention. This case presents the Court with a straight-forward opportunity to provide much needed guidance as to whether, and to what extent, factual disputes must be resolved by a sentencing court in connection with the imposition of criminal fines.

III. THE COURT ERRED IN REFUSING TO GROUP J&T'S OFFENSES UNDER THE SENTENCING GUIDELINES, AND IN ASSESSING AN INAPPROPRIATE INCREASE IN OFFENSE LEVEL GIVEN THE DECISION NOT TO GROUP.

Respondent attempts to gain solace from waiver principles in an effort to sidestep the grouping issue. Noticeably, there is no quarrel from the prosecution in its Opposition Brief that the trial court's calculation error did result in an increase of five levels from a level 14 offense to a level 19 offense, even though a three

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[4]The presentence report suggested only that JAD had sufficient resources to pay the fine recommended in that report, which had a range of $119,000 to $238,000. (JA 398 -- under seal.) The trial court, however, rejected that fine recommendation, imposed a fine of $1.4 million, and never made any determination as to J&T's ability to pay.

level increase to 17 was the maximum increase permissible by the guidelines. Petition at 28-29. Nor does the prosecution dispute that this error literally doubled J&T's fine range. (Pet. App. 81.)[5]

What the prosecution fails to point out is that the pre-sentencing report called for imposition of a level 14 offense. (JA 397 -- under seal.) J&T did not contest this aspect of the pre-sentence report, but certainly did argue that the level should be no higher than 14, consistent with the report. (JA 114-15.) The trial court, nevertheless, disregarded the report's recommendation and imposed a monumentally higher fine than that called for in the report, based on a level 19 offense.

In criminal matters "victory for the government lies in the right decision, not a favorable decision." United States v. Atehortua, 875 F.2d 149, 153 (7th Cir. 1989). Yet here, in many instances, the prosecution does not even suggest that the court acted properly, but seeks to excuse plain error and injustice on the basis of waiver and expediency. The record below reveals that the sentencing process below was flawed at its very core. Review by this Court will help ensure that future fines are meted out in an ordered, judicious manner -- even in cases where fact-finding may prove to be "cumbersome." (Pet. App. 13.)

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[5]It was the prosecution which requested this 5 level increase. (JA 401.)

CONCLUSION

This case presents multiple issues of vital importance on which the circuits are split. The Fourth Circuit's decision below does violence to this Court's Double Jeopardy jurisprudence and should not be permitted to stand. Similarly, the court's holding that the safeguards of Fed. R. Crim. P. 32, and related statutes, may be glossed over when found to be "cumbersome" should be rejected. The decision below establishes dangerous precedents, and involves significant questions, which merit review by this Court.

Respectfully submitted,

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